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Extraterritorial Criminal Enforcement of Securities Fraud Regulations after *United States v. Vilar*¹

EDGARDO ROTMAN^{*}

In August 2013, the Court of Appeals for the Second Circuit in the case of United States v. Vilar denied extraterritorial application of the criminal law antifraud provisions contained in the Securities Exchange Act. The specific object of this paper is to criticize this decision and negate its premises.

¹ A German-language version of this paper was presented at the Max-Planck Institute for Criminal Law in Freiburg, Germany, on October 8, 2014. The English-language version was presented at the University of Miami School of Law, in Florida, United States, on November 19, 2014. The paper draws from a chapter in a larger project about the internationalization of business-related criminal law. I thank Dr. Johanna Rinceanu, Prof. Attilio Nisco, and Dr. Marc Engelhart, who in June of 2014 encouraged me to pursue my project based on applying German criminal law theoretical categories to the *United States v. Vilar* analysis. I am indebted to Caroline Bradley and Elliott Manning for their crucial insights and information. I am also grateful to Prof. Dr. Ulrich Sieber, director of the Max-Planck Institute; Prof. Dr. Klaus Tiedemann; Prof. Dr. Albin Eser; Dr. Benjamin Vogler; Dean Patrick Gudridge; Prof. Richard Williamson; and Prof. Robert Rosen for valuable comments after my presentations in Germany and in the United States. Parker Crouch, Aleksa Rego, Kelsey Bloomenfeld, Alice Riviere, Katharina Funcke, Zhenying Li, and Magena Rodriguez provided outstanding research assistance. Nadia Amlaz, Alice Riviere, and Katharina Funcke helped in translating the original English text into German. Pamela Lucken provided superb reference librarianship. Doreen Yamamoto and Magena Rodriguez made excellent editorial suggestions.

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*After delving in depth into the notion of extraterritoriality, the paper offers a dynamic interpretation of the 1922 Supreme Court's decision in *United States v. Bowman*, which is still the governing precedent on extraterritorial application of criminal laws. Furthermore, the paper criticizes the application of the 2010 Supreme Court's decision in *Morrison v. National Australia Bank* to criminal cases and explains the Dodd-Frank Act's failed attempt to overrule it.*

*The paper undertakes a detailed analysis of each of *United States v. Vilar*'s supporting arguments, using the German criminal law model to identify some of this decision's significant shortcomings. The paper begins with a discussion of the extent and significance of the *United States v. Bowman* exception to the presumption against extraterritoriality in light of the need to protect the integrity of a delocalized capital market. Next, the paper interprets section 32(a) of the Securities Exchange Act in accordance with modern developments of criminal law theory. Consequently, the paper analyzes the significant distinctions between criminal and civil law in contrast with their equation by the *Vilar* court. The discussion ultimately leads to a justification of the Securities Exchange Act's extraterritorial enforcement through a contextual and dynamic interpretation of section 32(a), taking into consideration the transnational nature of market integrity and public wealth values protected by this provision.*

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INTRODUCTION

In August 2013, the Court of Appeals for the Second Circuit in the case of *United States v. Vilar* denied extraterritorial application of the criminal law antifraud provisions contained in the Securities Exchange Act. The specific object of this paper is to criticize this decision and negate its premises.

After delving in depth into the notion of extraterritoriality, the paper offers a dynamic interpretation of the 1922 Supreme Court's decision in *United States v. Bowman*, which is still the governing precedent on extraterritorial application of criminal laws. Furthermore, the paper criticizes the application of the 2010 Supreme Court's decision in *Morrison v. National Australia Bank* to criminal cases and explains the Dodd-Frank Act's failed attempt to overrule it.

The paper undertakes a detailed analysis of each of *United States v. Vilar*'s supporting arguments, using the German criminal law model to identify some of this decision's significant shortcomings. The paper begins with a discussion of the extent and significance of the *United States v. Bowman* exception to the presumption against extraterritoriality in light of the need to protect the integrity of a delocalized capital market. Next, the paper interprets section 32(a) of the Securities Exchange Act in accordance with modern developments of criminal law theory. Consequently, the paper analyzes the significant distinctions between criminal and civil law in contrast with their equation by the *Vilar* court. The discussion ultimately leads to a justification of the Securities Exchange Act's extraterritorial enforcement through a contextual and dynamic interpretation of section 32(a), taking into consideration the transnational nature of market integrity and public wealth values protected by this provision.

I. THE CRUCIAL ROLE OF EXTRATERRITORIAL ENFORCEMENT OF UNITED STATES CRIMINAL LAW IN THE PREVENTION AND REPRESSION OF FINANCIAL FRAUD

A. *Evolution of the Notion of Extraterritoriality*

In the past, extraterritorial application of national criminal laws was very limited.² Extraterritoriality grew with the emergence of

² David Hume wrote that Scottish courts "are not instituted to administer justice over the whole world, but in our country, or a particular district of it only." 2 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING CRIMES 52 (1797), *quoted in* MICHAEL HIRST, JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW 29 (Oxford U. Press 2003). John Austin considered extraterritorial applications of jurisdictional rules "anomalous cases" in THE PROVINCE OF JURISPRUDENCE DETERMINED 355 (Prometheus Books 2000), *cited by* GÜNTHER HANDL, JOACHIM ZEKOLL & PEER ZUMBANSEN, BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALISM 17 (Martinus Nijhoff Publishers 2012). In *MacLeod v. Attorney-General for New South Wales* [1891] AC 455, 458 (Austl.), the court asserted that "all crime is local" and "the jurisdiction over the crime belongs to the country where the crime is committed." With respect to the United States, Cedric Ryngaert points out that "[t]hroughout the history of US law, US courts have time and again pointed out the importance of the territorial principle." CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 59 (2d ed. 2008). In their contributions to a book on the harmonization of

modern forms of globalization.³ In the field of securities laws, the comments to § 416 of the Restatement (Third) of Foreign Relations explain that “[a]s organized securities markets in different states are increasingly connected through electronic and institutional links,” territorial factors in the exercise of prescriptive jurisdiction may become less relevant and extraterritorial factors more important.⁴

In early English common law, a court could not hear a case if any of what we currently call “elements of a crime” occurred outside of England.⁵ For example, in 1583, a murder committed on the fore-shore came within the exclusive jurisdiction of the criminal admiralty court only “because it occurred on the seabed owned, by the Crown under the Royal Prerogative”⁶

In the United States, the notion of extraterritoriality experienced dramatic changes since its early formulation in the 1824 *Appollon* case.⁷ According to this decision, a nation is entirely precluded from extending its laws beyond its own borders, “except so far as regards its own citizens.”⁸

In the present era of globalization, the exercise of extraterritorial jurisdiction has been deemed inevitable.⁹ “The expansion of commercial and financial interstate links has increased the vulnerability

criminal law, Mireille Delmas-Marty points out that the right to punish “is traditionally considered an emblem of national sovereignty,” and Mark Pieth expresses that he was astonished that criminal law is developing into one of the driving forces of harmonization of law “even though it was always considered a traditional stronghold of national sovereignty.” Mireille Delmas-Marty, Mark Pieth & Ulrich Sieber, *Les Chemins De L’Harmonisation Pénale Harmonising Criminal Law*, SOCIÉTÉ DE LEGISLATION COMPARÉE 19, 225 (2008).

³ For earlier historical precedents of globalization, see Edgardo Rotman, *The Globalization of Criminal Violence*, 10 CORNELL J.L. & PUB. POL’Y 2, 38 (2000).

⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 416 cmt. at 298 (1987).

⁵ Kenneth S. Gallant, *What Exactly is “Extraterritorial Application” of a Statute?*, JURIST Forum (May 28, 2013), <http://ssrn.com/abstract=2271267>.

⁶ Lacy’s Case (1583) 74 Eng. Rep. 246 (K.B.), cited in RALPH J. GILLIS, *NAVIGATIONAL SERVITUDES: SOURCES, APPLICATIONS, PARADIGMS* 76 (2007).

⁷ The *Appollon*, 22 U.S. 9 Wheat. 362 (1824).

⁸ *Id.* at 370. This exception was confirmed by JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS: FOREIGN AND DOMESTIC, IN REGARDS TO CONTRACTS, RIGHTS, AND REMEDIES* 22 (1834) (expressly stating that every nation has a right to bind its own citizens by its own laws in every place beyond its boundaries).

⁹ See RYNGAERT, *supra* note 2 at 187.

of States to adverse domestic effects of foreign activities.”¹⁰ In the field of securities law, the extraterritorial reach of national law may become necessary when some states set low standards to attract investors, refuse to criminalize certain fraudulent activities such as insider trading, or avoid stringent corporate governance regulations.¹¹

There is a certain parallel between the evolution of American law and German law on the subject, especially in light of how these laws’ extraterritorial reach expanded from the end of the nineteenth century onwards.

To understand this evolution, I turn to a late nineteenth-century classic text on extraterritoriality from Ernst Beling, one of the most prestigious German scholars of that period.¹² In 1896, extraterritorial questions were limited to the legal status of governments, diplomats and their property, ships, and certain German representatives abroad.¹³ In sharp contrast, Peter Roegele’s 2014 book, significantly titled *German Criminal Law Imperialism*, shows how German criminal law today applies extraterritorially in manifold ways.¹⁴ Globalization of crime, the intensification of interstate relations, and the need to protect transnational vital interests and values have determined the continuing expansion of German criminal law beyond its national borders since 1871.¹⁵

B. *Extraterritoriality of Business-Related Criminal Law in a Globalized Economy*

Although criminal law, as “the most parochial of legal disciplines,”¹⁶ has traditionally been a stronghold of territoriality, the challenge of transnational business crimes in today’s interconnected world requires the extraterritorial application of business-related criminal laws as an indispensable condition of their effectiveness.

¹⁰ *Id.*

¹¹ *Id.*

¹² See generally ERNST BELING, DIE STRAFRECHTLICHE BEDEUTUNG DER EXTERRITORIALITÄT (1896).

¹³ See *id.*

¹⁴ See generally PETER ROEGELE, DEUTSCHER STRAFRECHTSIMPERIALISMUS: EIN BEITRAG ZU DEN VÖLKERRECHTLICHEN GRENZEN EXTRATERRITORIALER STRAFGEWALTAUSDEHNUNG (2014).

¹⁵ *Id.* at 2, 236.

¹⁶ Markus D. Dubber, *Criminal Law in Comparative Context*, 56 J. LEGAL EDUC. 433, 433 (2006).

Globalization of financial markets, advances in communications and transportation technologies, decreasing relevance of national borders, emergence of computer networks, reduced state authority, increasing cyber finance and offshore banking, and high demand for American securities abroad and vice versa, have increased the potential for transnational criminal securities fraud.

The extraterritorial application of national laws constitutes an immediate response to such challenges. Other forms of internationalization of business-related criminal law that would presumably eliminate safe havens and prevent securities fraud are: a) international treaties requiring an expanding number of nations to criminalize certain business crimes; b) preventive efforts by a number of international financial institutions and standard-setting, and trans-governmental regulatory networks;¹⁷ and c) “soft law” harmonization of national legislations eventually resulting in convergent national business-related criminal law systems.

C. The Pros and Cons of Extraterritorial Enforcement of Business-Related Criminal Law

An inquiry into the normative aspects of extraterritorial enforcement of geographically ambiguous statutes will facilitate the understanding of specific aspects of the *Vilar* decision.

The extraterritorial application of criminal law provisions governing securities fraud raises significant normative issues relating to respect of the sovereignty of other nations and established principles of international law, such as non-intervention, comity, and sovereign equality.¹⁸ Also, such extraterritorial application may infringe upon the domestic constitutional principle of separation of powers.¹⁹ Moreover, from the viewpoint of democracy, extraterritorial jurisdiction may impose national laws on foreign legal subjects who did not participate in their enactment.²⁰

¹⁷ See Stephen Kim Park, *Guarding the Guardians: The Case for Regulating State Owned Financial Entities in Global Finance*, 16 U. PA. J. BUS. L. 739, 740–56 (2014); see also Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 28–35 (2002).

¹⁸ RYNGAERT, *supra* note 2, at 188.

¹⁹ *Id.*

²⁰ *Id.*

However, as John C. Coffee, Jr. points out, curtailments of extraterritoriality, when not expressly mandated by statutory provisions, “miss much, and the unfashionable word—‘extraterritorial’—cannot be avoided.”²¹ He mentions four basic reasons that weigh heavily to support his conclusion: 1) the extreme mobility of major financial institutions and their ability to park abroad their high-risk operations, thus escaping the regulatory reach of their national legal systems; 2) because major financial institutions are “too interconnected to fail,” regulation of systemic risk requires extending regulations beyond domestic financial institutions to their foreign counterparts as well; 3) the preference of some countries to keep “soft law” standards “aspirational and ineffable” because they profit from extremely risky unregulated havens; and 4) the assertion of extraterritorial authority by the major financial nations as the best way to spur international bodies to develop a high consensus leading to meaningful “soft law” standards.²²

Another set of normative arguments supporting the extraterritorial application of national statutes can be drawn from the customary international law justifications of extraterritoriality, especially from the protective principle. Transnational securities fraud may cause serious damage to the integrity of financial markets, affecting vital economic interests of a nation. Such territorial impact justifies the extraterritorial reach of national laws under international law.

In addition, to support the extraterritoriality of securities fraud-related criminal provisions, it is useful to draw from the area of competition law: the extraterritorial reach of national criminal sanctions “enables states to protect their domestic market[s] from anti-competitive activities which, while taking place elsewhere, adversely affect the home jurisdiction.”²³ This basic argument can be applied by analogy to the field of securities fraud. Also, here, extraterritoriality adds a deterrent effect by addressing violations unchallenged by the

²¹ John C. Coffee, Jr., *Extraterritorial Financial Regulation: Why E.T. Can't Come Home* 3 (European Corp. Governance Inst., Working Paper No. 236, 2014), <http://ssrn.com/abstract=2347556>.

²² *Id.* at 4–5.

²³ Ariel Ezrachi & Jiří Kindl, *Cartels as Criminal? The Long Road from Unilateral Enforcement to International Consensus*, in *CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT* 419, 424 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).

home jurisdiction due to lack of legislation or enforcement powers.²⁴ As in the case of competition law, “extraterritoriality of criminal sanctions [for securities law violations] may supplement administrative procedures in other jurisdictions.”²⁵

In the area of competition law, the extraterritorial reach of anti-trust prohibitions makes a conceptual contribution to the public perception of the need for delivering markets from restrictive practices. In this respect, the extraterritorial application of competition law-related criminal provisions has been praised for its export of “competition values.”²⁶ The extraterritorial application of securities fraud-related criminal provisions may similarly contribute to global consensus on a fair and efficient securities market. Furthermore, the extraterritorial application of criminal law provisions to countries operating in the global market force-feeds the criminalization agenda to jurisdictions that resist extraterritoriality.²⁷

Austen L. Parrish advocates resolving global challenges through multilateral agreements rather than through unilateral domestic action.²⁸ He recognizes, however, that “[e]xtraterritorial regulation is not always a bad idea. In under-regulated areas, extraterritoriality can sometimes fill a gap. And it may be that extraterritorial regulation can serve as a placeholder before more comprehensive international agreement can be reached.”²⁹

Also, the rigid application of the presumption against extraterritoriality ignores some positive effects created by the extraterritorial application of United States law, such as “promot[ing] international negotiation and cooperation.”³⁰ A similar, positive effect had been noted in the extraterritorial application of anti-bribery laws, based

²⁴ *See id.*

²⁵ *Id.*

²⁶ *Id.* at 425.

²⁷ The idea of force-feeding is used in the field of competition law. *See id.*

²⁸ Austen L. Parrish, Morrison, *The Effects Test, and the Presumption Against Extraterritoriality: A Reply to Professor Dodge*, 105 AM. SOC’Y INT’L L. PROC. 399, 401–02 (2011).

²⁹ *Id.* at 402.

³⁰ William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 163–68 (1998), cited by William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 117 (1998) (emphasis omitted) [hereinafter *Presumption Against Extraterritoriality*].

on the Organisation for Economic Co-operation and Development on Combating Bribery of Public Officials in International Business Transactions, by generating mechanisms that should help firms do ethical business and comply with this type of legislation.³¹

Sarah C. Kaczmarek and Abraham L. Newman carried out an empirical study showing that extraterritorial application of the Foreign Corrupt Practices Act dramatically increases the likelihood that foreign countries enforce their own anti-bribery norms.³² Through econometric analysis, Kaczmarek and Newman determined that “the odds of a country enforcing its first [anti-corruption] case are twenty times greater if a country has experienced extraterritorial application of the [United States Foreign Corrupt Practices Act].”³³ By the same token, some pre-*Morrison* federal court decisions gave credit to the extraterritorial application of United States antifraud provisions for encouraging Americans to achieve a high standard of business ethics in the securities industry.³⁴

On the negative side, the extraterritorial application of business-related criminal sanctions in one jurisdiction may undermine administrative or compliance programs in another.³⁵ Also, extraterritorial application of this type of criminal norm may bring about a host of double-jeopardy problems.³⁶

Mireille Delmas-Marty warns that a unilateral expansion of internal law under the guise of combating impunity risks becoming an “internationalization of hegemonic type.”³⁷ Also, Stephen Kim Park recognizes that the possibility of this unilateral extraterritorial reach

³¹ Branislav Hock, *Intimations of Global Anti-Bribery Regime and the Effectiveness of Extraterritorial Enforcement: From Free-Riders to Protectionism?* 9 (Tilburg Law & Econ. Ctr., Discussion Paper No. 2014-009, 2014), <http://ssrn.com/abstract=2395156>.

³² Sarah C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT’L ORG. 745, 760 (2011).

³³ *Id.*

³⁴ Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. DAVIS L. REV. 1071, 1082 (2010).

³⁵ Ezrachi & Kindl, *supra* note 23, at 425.

³⁶ *Id.*

³⁷ Mireille Delmas-Marty, *Les Figures de L’Internationalisation en Droit Pénal des Affaires: Aplanir le Terrain de Jeu*, REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ, 735, 737 (2005).

is “contingent on highly concentrated state power,”³⁸ and that” the project[ion] [of a state’s] regulatory rules . . . depends on its status as an economic hegemon.”³⁹

While recognizing the superiority of multilateral solutions, the extraterritorial application of United States securities fraud-related criminal norms cannot be dismissed merely because of their characterization as “hegemonic.” The immediate extraterritorial reach may be indispensable not only to protect investors and punish unscrupulous manipulators, but ultimately to protect the integrity of financial markets intimately related to the protection of public wealth.⁴⁰ For instance, market integrity has a constitutional rank in Italy as a condition of the market economy.⁴¹ In this regard, Salvatore Panagia believes that Article 41, section 2, in combination with Article 47 of the Italian Constitution, demonstrates that without criminal law protection of the integrity of financial markets against abuses and speculative excesses, these illegal abuses would not only destroy people’s savings, but also the private will to invest.⁴²

The most damaging effects of securities fraud, like those of other business-related crimes, are that they create distrust toward the system and its healthy components. Sutherland underscores that the most important damage resulting from white-collar crimes is the one caused in social relations by destroying trust, depressing social morale, and producing disorganization.⁴³ Because public trust constitutes the vital sapping of international commerce,⁴⁴ an attack on it by white-collar crimes poses a challenge that justifies the extraterritorial application of national criminal laws.

³⁸ Park, *supra* note 17, at 754.

³⁹ *Id.*

⁴⁰ FEDERICO CONSULICH, LA GIUSTIZIA E IL MERCATO: MITI E REALTÀ DI UNA TUTELA PENALE DELL’INVESTIMENTO MOBILIARE 405 (Dott. A. Giuffrè S.p.A. ed., 2010).

⁴¹ SALVATORE PANAGIA, LA TUTELA PENALE DEI MERCATI FINANZIARI: LA FATTISPECIE PENALE A RISCHIO DEFAULT 72 (G. Giappichelli ed. 2011).

⁴² *Id.*

⁴³ EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 13 (1967).

⁴⁴ EDGARDO ROTMAN, LOS FRAUDES AL COMERCIO Y A LA INDUSTRIA 30 (1974).

II. OVERVIEW OF *UNITED STATES V. VILAR*'S FUNDAMENTAL PRECEDENTS

A. *United States v. Bowman*

In *United States v. Bowman*,⁴⁵ the Supreme Court decided a fraudulent fuel oil claim brought by a United States-owned corporation for one of its ships. The fraud consisted of purchasing 1,000 tons of fuel oil and delivering only 600 tons.⁴⁶ The money paid for the undelivered 400 tons was then divided among four defendants.⁴⁷ Bowman—the ship's engineer—and the master concocted the fraud aboard the ship with the participation of two other co-conspirators based in Rio de Janeiro.⁴⁸

In *Bowman*, the Supreme Court established that the presumption against extraterritoriality does not apply to criminal statutes that are not “logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud, wherever perpetrated”⁴⁹ Limiting the locus of some criminal offenses, the Court explained, would greatly “curtail the scope and usefulness of the statute and leave open a large immunity for fraud[]” committed in a foreign country.⁵⁰ In other words, *Bowman* held that the presumption against extraterritoriality is not applicable when it undermines the statute’s purpose.⁵¹

B. *Morrison v. National Australia Bank*

In June 2010, the United States Supreme Court decided *Morrison v. National Australia Bank*,⁵² a case of obvious abuse of American judicial resources by Australian plaintiffs through a foreign-cubed⁵³ securities fraud class action. As pointed out by Justice

⁴⁵ 260 U.S. 94 (1922).

⁴⁶ *Id.* at 95.

⁴⁷ *Id.* at 95–96.

⁴⁸ *Id.* at 95.

⁴⁹ *Id.* at 98.

⁵⁰ *Id.*

⁵¹ *Id.* at 102.

⁵² 561 U.S. 247 (2010).

⁵³ Foreign-cubed is defined as cases where there is a foreign plaintiff suing a foreign defendant for acts committed on foreign soil. *See Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008).

Stevens in his concurring opinion, the “case has Australia written all over it.”⁵⁴

Morrison significantly limited the extraterritorial scope of the antifraud provisions contained in section 10(b) of the Securities Exchange Act⁵⁵ and SEC Rule 10(b)(5),⁵⁶ finding that these provisions do not create a private right of action for foreign purchasers of foreign securities outside the United States.⁵⁷ Prior to *Morrison*, the Court of Appeals for the Second Circuit required that the alleged wrongful conduct had to have substantial effects in the United States in connection with securities and transactions abroad (“effects test”) or that sufficient fraudulent conduct occurred in the United States in connection with securities transactions abroad (“conduct test”).⁵⁸ In *Morrison*, the Supreme Court knocked down nearly forty years of federal courts’ decisions, replacing their “conduct” and “effects” tests with a new “transactional” test, limiting the scope of section 10(b) to causes of action that involve “only transactions in securities listed on domestic exchanges and domestic transactions in other securities.”⁵⁹ The Court applied a strict presumption against extraterritoriality when the “focus” of the relevant statute occurred outside the territory of the United States. The Court concluded that the “focus” of the Exchange Act “is not on the place where the deception originated, but on purchases and sales of securities in the United States.”⁶⁰

C. *Morrison’s Casualties*

Morrison left investors unprotected in a number of situations. As explained below, *United States v. Vilar* has compounded such flaws by depriving victims of criminal law protection.

Some of these consequences are mentioned by Justice Stevens in his concurring opinion in *Morrison*. He gives the imaginary example of an American investor buying shares of a foreign corporation that has a major American subsidiary with executives based in

⁵⁴ *Morrison*, 561 U.S. at 286 (Stevens, J., concurring).

⁵⁵ 15 U.S.C. § 78i (2012).

⁵⁶ 17 C.F.R. 240.10b-5 (2015).

⁵⁷ *Morrison*, 561 U.S. at 273.

⁵⁸ *Morrison*, 547 F.3d at 171.

⁵⁹ *Morrison*, 561 U.S. at 267.

⁶⁰ *Id.* at 266.

New York City.⁶¹ The executives mastermind a massive deception inflating the corporation's stock, which is only listed on an overseas exchange, causing the price to plummet.⁶² To this situation Justice Stevens adds another imaginary one in which the same executives persuade an unsophisticated retiree in Manhattan, on the basis of material misrepresentations, to invest her life savings in the company's doomed securities.⁶³ Steinberg and Flannigan give a similar example of "a retiree, after being sold a doomed security in a door-to-door sale by an executive of a foreign owned U.S. subsidiary, might be barred from bringing a section 10(b) action."⁶⁴

A group of forty-two professors provide a list of dismissals of securities-fraud cases since *Morrison*, underscoring that this deficiency in investor protection would not have happened with a "conduct" and "effects" test because these tests captured the potential complexity of the relationships among investors and issuers.⁶⁵ Among these cases, I highlight one of a Norwegian securities firm and seven Norwegian municipalities that brought suit against various Citigroup entities.⁶⁶ This case concerned the sale of fund-linked notes that were issued and traded outside the United States, but were structured, arranged, and managed in the United States by Citigroup's New York subsidiaries.⁶⁷ Applying the conduct test, the district court found that the essential core of the alleged fraud occurred in New York.⁶⁸ Six months later, after the Supreme Court decided *Morrison*, the district court reversed its previous decision and granted defendant's motion to dismiss because the fund-linked notes were listed on European stock exchanges, notwithstanding the

⁶¹ See *id.* at 285 (Stevens, J., concurring).

⁶² See *id.*

⁶³ See *id.*

⁶⁴ Marc I. Steinberg & Kelly Flanagan, *Transnational Dealings—Morrison Continues to Make Waves*, 46 INT'L LAW. 829, 863–64 n.304 (2012).

⁶⁵ Comments from Robert P. Bartlett et al., to Elizabeth M. Murphy, Sec'y, Securities and Exchange Commission 13–18, (Feb. 18, 2011), <http://www.sec.gov/comments/4-617/4617-28.pdf>.

⁶⁶ See *Terra Secs. ASA Konkursbo v. Citigroup, Inc.*, 740 F. Supp. 2d 441 (S.D.N.Y. 2010).

⁶⁷ See *id.* at 444–45.

⁶⁸ See *Terra Secs. ASA Konkursbo v. Citigroup, Inc.*, 688 F. Supp. 2d 303 (S.D.N.Y. 2010).

fact that the essential core of the alleged fraud occurred in New York.⁶⁹

It is noteworthy that in transnational securities fraud cases covered in the past by circuit courts' "conduct" and "effects" tests, in both situations something happens in the United States, and therefore, Congress has an interest in them, and a presumption against such interest is unfounded.⁷⁰ Precisely this circumstance is appropriately expressed in one of the earliest securities fraud Second Circuit decisions, where Judge Friendly pointed out "[t]he New Yorker who is the object of fraudulent misrepresentations in New York is as much injured if the securities are of a mine in Saskatchewan as in Nevada" and "that Congress would have wished protection to be withdrawn merely because the fraudulent promoter of the Saskatchewan mining securities took the buyer's check back to Canada and mailed the certificate from there."⁷¹ This is precisely one of the situations deprived from protection in *Morrison*.⁷² Federal courts adopted Judge Friendly's position for four decades without congressional reaction, while *Morrison*'s interpretation lasted less than four weeks until the Dodd-Frank Wall Street Reform and Consumer Protection Act attempted to reinstate both the "conduct" and the "effects" test for actions brought by the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ").

D. *The United States Congress' Failed Attempt to Overrule Morrison*

Morrison left ambiguous the SEC and DOJ's authority to bring extraterritorial actions under § 10(b). In July 2010, Congress addressed this issue in sections 929P(b) and 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act; the most important financial reform legislation since 1934.⁷³ These norms grant the SEC and DOJ jurisdiction over conduct within the United States

⁶⁹ See Terra Secs. ASA Konkursbo, 740 F. Supp. 2d at 444–47.

⁷⁰ John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. L. REV. 635, 648 (2011).

⁷¹ *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1336–37 (2d Cir. 1972), cited by *id.*

⁷² Knox, *supra* note 70.

⁷³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, tit. IX, §§ 929P(b), 929Y (2010).

that constitutes significant steps in furtherance of the violation, even if the securities transactions occur outside the United States and involve only foreign investors, or conduct occurring abroad that has a foreseeable, substantial effect within the United States.⁷⁴ In other words, Congress provided extraterritorial jurisdiction for SEC and DOJ actions under § 10(b) by using a “conduct” and “effects” test similar to the one used by the federal courts before *Morrison*.

Representative Paul Kanjorski, chairman of the committee that drafted the Dodd-Frank Act sections 929P(b) and 929Y in Title IX, in his floor statement, expressed that the purpose of the reform was to grant authority to the SEC and DOJ to bring civil or criminal enforcement proceedings involving transnational securities fraud under both the “conduct” and the “effects” tests developed by the courts regardless of the jurisdiction of the proceedings.⁷⁵ Addressing the very recent Supreme Court decision in *Morrison*, Representative Kanjorski reaffirmed that the bill’s provisions concerning extraterritoriality are intended to rebut the presumption against extraterritoriality “by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department.”⁷⁶

Conversely, George T. Conway III, the lawyer who argued and won the *Morrison* case for the defendant, concluded that section 929P(b) does not rebut the presumption against extraterritoriality because the provision addresses only the “jurisdiction” of the “district courts of the United States” to hear cases involving extraterritorial elements.⁷⁷ Conway points out that the drafters of the Dodd-Frank Act ignored that in the *Morrison* decision the Supreme Court reiterated the long-standing principle that the territorial scope of a federal law does not present a question of jurisdiction, but rather a question of substance.⁷⁸

⁷⁴ See *id.*

⁷⁵ 156 CONG. REC. H5237 (daily ed. Jun. 30, 2010) (statement of Rep. Kanjorski).

⁷⁶ See *id.*

⁷⁷ George T. Conway III, *Extraterritoriality After Dodd-Frank*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Aug. 5, 2010), <http://corpgov.law.harvard.edu/2010/08/05/extraterritoriality-after-dodd-frank/>.

⁷⁸ See *id.*; see also Wulf A. Kaal & Richard W. Painter, *The Aftermath of Morrison v. National Australia Bank and Elliott Associates v. Porsche*, 8 EUR.

David He considers it unlikely that any lower court would interpret the statute in contradiction with Congress's objectives "because it is clear that Section 929P(b) intended to reinstate the conduct and effects approach for civil and criminal enforcement actions brought by the government against overseas violators" ⁷⁹ In addition, He cites Painter, ⁸⁰ expressing that "[m]ost judges will not be willing to tell Congress that, because of the way a statute is worded, it fails to accomplish anything at all." ⁸¹

If the SEC were free from *Morrison*'s jurisdictional limitations in civil actions, as the Dodd-Frank Act intended, the SEC investigations and DOJ prosecutions of criminal violations of the Securities Acts would unquestionably be free from the same restrictions. This paper challenges the *Vilar* decision that extends the *Morrison* jurisdictional limitations to criminal cases. *Vilar* implicitly assumes that the Dodd-Frank Act was ineffective. If the Dodd-Frank Act were effective, *Vilar* would become irrelevant.

III. CRITICAL ANALYSIS OF *UNITED STATES V. VILAR*

A. United States v. Vilar

In *United States v. Vilar*, appellants Alberto Vilar and Gary Alan Tanaka were convicted of securities fraud, securities investment fraud, and conspiracy, and they were sentenced respectively to 108 and 60 months of imprisonment, required to pay \$35 million in restitution, and ordered to forfeit \$54 million. ⁸² Exploiting their positions as prominent investment managers and advisors, Vilar and Tanaka solicited millions with the promise of investing the funds in predominantly safe, short-term deposits, but instead invested the money in highly volatile technology and biotechnology stocks. ⁸³

CO.& FIN. L. REV. 77, 79 (2011); Richard Painter et al., *When Courts and Congress Don't Say What They Mean: Initial Reactions to Morrison v. National Australia Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INTL L. 1 (2011).

⁷⁹ David He, *Beyond Securities Fraud: The Territorial Reach of U.S. Laws after Morrison v. N.A.B.*, 2013 COLUM. BUS. L. REV. 148, 168 (2013).

⁸⁰ Kaal & Painter, *supra* note 78, at 19.

⁸¹ He, *supra* note 79, at 169 n.69.

⁸² *United States v. Vilar*, 729 F.3d 62 (2nd Cir. 2013).

⁸³ *See id.* at 68.

The dot-com bubble burst of 2000 led to the precipitous fall of their investment.⁸⁴ In the midst of the catastrophe, they obtained \$5 million dollars from a client by deceiving her with the false promise of an illusory investment, while actually embezzling the entrusted funds to meet various personal and corporate obligations.⁸⁵ In this case, the Second Circuit held that securities fraud prohibitions section 10(b)⁸⁶ and Rule 10b-5⁸⁷ do not apply extraterritorially in criminal cases.⁸⁸ I will analyze the supportive reasons for this conclusion step-by-step in the critical analysis below. The German criminal law model plays a pivotal role in this analysis.

B. How a Comparative Analysis of the German Criminal Law Model Can Help Identify Significant Shortcomings in United States v. Vilar

The German model consists of a set of abstract criminal law categories adopted by most of continental Europe, Latin America, and diverse parts of the world. This model is based on a comprehensive and consistent methodology that “lends itself to application to any system of criminal law regardless of its legislative foundations.”⁸⁹

Traditionally, German jurisprudence is regarded as a science that shares the scientific status of the social and behavioral sciences.⁹⁰ Indeed, a prominent Spanish criminal law scholar considers the German system of criminal law to be an achievement of the human sciences.⁹¹

The use of a foreign model is justified by the paucity of categorizations existing within the common law to resolve issues presented

⁸⁴ See *id.*

⁸⁵ See *id.* at 68–9.

⁸⁶ 15 U.S.C. § 781 (2012).

⁸⁷ 17 C.F.R. 240.10b-5 (2015).

⁸⁸ See Vilar, F.3d at 98.

⁸⁹ Francisco Muñoz Conde, “Rethinking” the Universal Structure of Criminal Law, 39 TULSA L. REV. 941 (2004).

⁹⁰ Markus Dirk Dubber, *The Promise of German Criminal: A Science of Crime and Punishment*, 6 GERMAN L. J. 1049, 1050–51 (2005).

⁹¹ Enrique Gimbernat Ordeig, *Sind die bisherigen dogmatischen Grunderfordernisse eines Allgemeinen Teils geeignet, dem heutigen Stand der Kriminalität, der Strafzumessung und des Sanktionensystems zu genügen?*, in KRISE DES STRAFRECHTS UND DER KRIMINALWISSENSCHAFTEN? 151, 165 (Duncker & Humboldt 2000).

by the *Vilar* case. This conceptual dearth is decried by a number of American scholars. I will draw on the German model to develop my critical analysis of *Vilar* and include references to American scholars' complaints about insufficiencies of United States law in this field.

C. Discussion of Each of United States v. Vilar's Supporting Arguments

In the following sections I will cite in bold characters the relevant parts of the *Vilar* decision, followed by my respective rebuttal.

1. FIRST CRITIQUE OF *VILAR*

“[T]he presumption against extraterritoriality applies to criminal statutes, and section 10(b) is no exception.”⁹²

a. The extent and significance of the Bowman exception

The *Bowman* decision excludes the presumption against extraterritoriality, as already explained, in criminal statutes that are not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction or fraud, wherever perpetrated.

Relying on some lower court decisions, the government claimed in the *Vilar* case that *Bowman* excluded the presumption against extraterritoriality in *all* criminal law cases.⁹³ The *Vilar* court accurately rejected this incorrect interpretation.⁹⁴ Indeed, the *Bowman* decision excludes the presumption against extraterritoriality only in *some* cases.⁹⁵

However, the *Vilar* court grievously misinterprets *Bowman* by excessively narrowing its exception to the point of making it inoperative. The *Vilar* court's erroneous interpretation of *Bowman* consists of limiting the exception to self-defense from attacks against government representatives or government property.⁹⁶ Indeed, the *Bowman* exception to the presumption against extraterritoriality also

⁹² *Vilar*, 729 F.3d at 74.

⁹³ *Id.* at 72.

⁹⁴ *Id.*

⁹⁵ *Id.* at 73.

⁹⁶ *Id.*

applies to governmental functions and to the vital social interests and goals served by the government.

To demonstrate the correctness of this argument, I will start with a grammatical interpretation. According to the 1922 *Bowman* decision, a limitation of the locus of some crimes to the strictly territorial jurisdiction would greatly “curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed” in foreign states as in the United States.⁹⁷ Furthermore, the decision refers only to criminal statutes “enacted because of the right of the Government to defend itself against *obstruction*, or fraud wherever perpetrated”⁹⁸

The *Bowman* exception to the presumption against extraterritoriality should not be limited to natural persons that represent the government or to the government’s property, but should be extended to the government’s functions as well as to its vital interests and goals. In a democratic system, the government is a means to achieve highly important social interests. This teleological interpretation is also confirmed by the *Bowman* decision when it uses the word “obstructions.”⁹⁹ The word “obstructions” clearly refers to governmental functions.¹⁰⁰ This interpretation is also confirmed by the examples provided in the *Bowman* decision as cases in which “Congress has not thought it necessary to make a specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.”¹⁰¹ For instance, “bribing a United States officer of the civil, military or naval service to violate his duty or to aid in committing a fraud on the United States.”¹⁰²

It is also important that the *Bowman* decision was later used to protect higher governmental interests, such as the environment and the integrity of insolvency procedures. Consider the *Skiriotes v. Florida*¹⁰³ decision. In this case, the Florida statute forbidding the use of diving equipment for the purpose of taking commercial

⁹⁷ United States v. Bowman, 260 U.S. 94, 98 (1922).

⁹⁸ *Id.* (emphasis added).

⁹⁹ *See id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 99.

¹⁰³ 313 U.S. 69 (1941).

sponges from waters within Florida's territorial limits was applied extraterritorially on the basis that the United States is not limited by any rule of international law from extending its laws extraterritorially to protect vital national interest such as natural resources.¹⁰⁴ This happens on the high seas and in foreign countries, provided that the rights of another nation or its nationals are not infringed.

In *Stegeman v. United States*,¹⁰⁵ the Stegemans were convicted of having transferred property from the state of Oregon to Canada after filing a petition in bankruptcy, thus knowingly and fraudulently concealing property belonging to the bankruptcy estate.¹⁰⁶ The court considered that, as in *Bowman*, "Congress has not thought it necessary to make a specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense."¹⁰⁷ On this basis, the court considered that Congress enacted section 18 U.S.C. § 152 to serve important governmental interests and "not merely to protect individuals who might be harmed by the prohibited conduct."¹⁰⁸

Under the exceptions to the presumption against extraterritoriality, my interpretation of *Bowman* therefore encompasses the criminal law provisions protecting the integrity of capital markets. Because of today's interconnectedness of capital markets through electronic and institutional links, the importance of their location plays such a reduced role that one can no longer speak of "local" markets. The globalization of capital markets requires a global system of investment protection; as long as this does not exist, the extraterritorial application of American legal provisions remains necessary.

b. *The Presumption Against Extraterritoriality Called into Question*

Another line of arguments questions the merit and value of the presumption against extraterritoriality, which was challenged by some scholars after the 2010 *Morrison* decision. In fact, these publications followed an article published in 2010 by John H. Knox in

¹⁰⁴ *Id.* at 72–77.

¹⁰⁵ 425 F.2d 984 (9th Cir. 1970).

¹⁰⁶ *See id.* at 985.

¹⁰⁷ *Id.* at 986 (quoting *United States v. Bowman*, 260 U.S. 94, 98 (1922)).

¹⁰⁸ *Id.* at 986.

the *American Journal of International Law*.¹⁰⁹ Knox made a painstaking historical analysis of the presumption against extraterritoriality, showing its changing underlying rationale through time, and pointing to its contradictions and incoherent application by the United States federal courts.¹¹⁰ Dissatisfied with these jurisprudential inconsistencies, he proposed a new interpretive canon—a presumption against “extrajurisdictionality,” the most predictable of the possible options.¹¹¹

Knox looked into the bases of jurisdiction under international law. In those cases where the United States has sole or primary jurisdiction, the courts are free to construe statutes without any presumption against their application.¹¹² When international law provides United States courts with only some basis of jurisdiction, the courts should apply a soft presumption against the application of the statute—that is, allow the courts to overcome it by indication of a legislative intent to do so.¹¹³ It is only when the United States entirely lacks any basis of jurisdiction under international law that a strict presumption against application of the law should be overcome by only express and clear legislative statement.¹¹⁴

In a subsequent 2011 article,¹¹⁵ Knox addressed the *Morrison* decision, rebutting its claim that the presumption against extraterritoriality provides “a stable background against which Congress can legislate with predictable effects.”¹¹⁶ He explained how *Morrison* “exacerbated longstanding confusions in the Court’s treatment of extraterritoriality” and noted that “virtues of a presumption against extrajurisdictionality are illustrated by the very circuit court decisions that *Morrison* rejected.”¹¹⁷ Knox renewed his proposal for a presumption against extrajurisdictionality, underscoring the need to

¹⁰⁹ John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351 (2010).

¹¹⁰ See generally *id.*

¹¹¹ *Id.* at 389.

¹¹² *Id.* at 353.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Knox, *supra* note 70.

¹¹⁶ *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 248 (2010).

¹¹⁷ Knox, *supra* note 70, at 635.

return to the roots of the presumption in the international law of legislative jurisdiction¹¹⁸ to bring the Supreme Court jurisprudence back “into coherence and in better alignment with reasonable assumptions of congressional intent. . . .”¹¹⁹

Knox pointed out that the Supreme Court showcased the presumption against extraterritoriality as predictable and stable; when in the Supreme Court’s hands, however, the presumption was used neither predictably nor stably. He underscored that the Court missed the opportunity to resolve the ambiguity regarding extraterritorial actions that affects the United States, compounding the confusion by emphasizing the “focus”¹²⁰ of the statute in determining its extraterritorial reach.¹²¹

More recently, Zachary D. Clopton challenges the validity and meaningfulness of the presumption against extraterritoriality and proposes to replace it altogether.¹²² Clopton makes an inventory of all the purported justifications of the presumption against extraterritoriality and concludes that none of them hold water.¹²³ These justifications from courts and scholars are based primarily on the need to avoid foreign conflicts and Congress’ overriding concern with domestic conditions.¹²⁴ To a lesser degree, other justifications include the need to affirm the principle of separation of powers by avoiding judicial activism and the prevention of due process violations through extraterritorial suits.¹²⁵

Clopton analyzes in depth each of these purported justifications, showing that they are weakened by contradictory judicial decisions

¹¹⁸ *Id.* Knox explains how a presumption against extrajurisdictionality would be more consistent with congressional intent and more predictable than the Court’s strict presumption against extraterritoriality.

¹¹⁹ *Id.* at 653.

¹²⁰ *Morrison*, 561 U.S. at 266. The Court concluded that the “focus” of the Exchange Act “is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.”

¹²¹ Knox, *supra* note 70, at 643.

¹²² Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 98 B.U. L. REV. 1 (2014).

¹²³ *See generally id.*

¹²⁴ *See generally id.* at 10–15.

¹²⁵ *See generally id.* at 15–20.

and that these decisions reveal “the presumption is poorly attuned to either of these laudable goals.”¹²⁶

It is significant for the purposes of my argument that Clopton negates the absolute and immutable status of the presumption predicated by the *Morrison* decision, reminding us that the presumption is a relative tool of federal statutory interpretation and not a constitutional principle.¹²⁷ In fact, Clopton indicates the possibility of replacing it altogether.¹²⁸

It is equally important that Clopton emphasizes that the rules regarding extraterritoriality should be different for civil, administrative, and criminal statutes.¹²⁹ It is disappointing, however, that Clopton’s proposed replacement for the presumption against extraterritoriality in criminal cases happens to be the rule of lenity,¹³⁰ a rule of interpretation that, though important within its narrow ambit of application, cannot be generalized to all cases of extraterritorial application of criminal law. The Supreme Court explains, “[t]he rule of lenity applies only if, ‘after seizing everything from which aid can be derived,’ [a court] can make ‘no more than a guess as to what Congress intended.’”¹³¹ It is necessary to distinguish the external geographical ambiguity of the field of application of a criminal statute from the intrinsic ambiguity relating to the prohibition and penalties contained in the definition of the criminal offense. Here, we are not dealing with an intrinsic grievous ambiguity of a criminal statute, but with a situation in which the extraterritorial purpose of the statute, although implicit, is clear and obvious to a point that makes it unnecessary to spell out.

The cases covered by the *Bowman* exception to the presumption against extraterritoriality interpret statutory silence in situations where the unexpressed statutory purpose is clear.¹³² Without this

¹²⁶ *Id.* at 1.

¹²⁷ *See id.* at 3–8.

¹²⁸ *Id.* at 21.

¹²⁹ *Id.* at 22–45.

¹³⁰ *Id.* at 30–31.

¹³¹ *Reno v. Koray*, 515 U.S. 50, 65 (1995) (quoting *Smith v. United States*, 508 U.S. 103, 108 (1993) and *Ladner v. United States*, 358 U.S. 169 (1958)).

¹³² *See* cases cited by Ellen S. Podgor & Daniel M. Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering United States v. Bowman*, 44 SAN DIEGO L. REV. 589 (2007).

provision, a misguided rule of lenity would eliminate all extraterritoriality of statutes that omit an express mention of their obvious purpose of extraterritorial application across-the-board, including the *Bowman* situation. Keeping the presumption against extraterritoriality limited by the exception introduced by *United States v. Bowman* is a more adequate solution.

2. SECOND CRITIQUE OF *VILAR*

The Supreme Court has already interpreted Section 10(b), and it has done so in unmistakable terms: ‘Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.’ To permit the government to punish extraterritorial conduct when bringing criminal charges under Section 10(b) ‘would establish . . . the dangerous principle that judges can give the same statutory text different meanings in different cases.’¹³³

Refusing to apply *Morrison*’s decision to the criminal enforcement of securities fraud is not giving a statutory text two different meanings. Indeed, we speak about two different rules within the same statute.

Section 10(b),¹³⁴ in itself, is no more than a private law prohibition. It is only when this behavior is carried out “willfully” that it becomes part of the criminal law definition contained in section 32(a).¹³⁵ Section 32(a) is the proper criminal law norm.¹³⁶ It establishes a serious criminal penalty and the conditions that the conduct has to meet in order to become criminal.¹³⁷

¹³³ *United States v. Vilar*, 729 F.3d 62, 74–75 (2d Cir. 2013) (citations omitted) (quoting *Clark v. Martinez*, 543 U.S. 371, 386 (2005)).

¹³⁴ 15 U.S.C. § 781 (2012).

¹³⁵ 15 U.S.C. § 78ff (2012).

¹³⁶ *See id.*

¹³⁷ *See id.*

The court in *Vilar* ignored that section 32(a) contains the definition of the crime, while section 10(b) generates only civil and administrative responsibilities, playing only a supplementary role when it is incorporated by reference into a criminal law rule to complete section 32(a)'s definition.¹³⁸

Here, among other instances, the German criminal law model provides an answer to an American legal question. In the present case, the answer comes from the category of blanket criminal norms. Incorporation by reference into a criminal norm has received considerable doctrinal development in countries belonging to the civil law system.¹³⁹ The doctrine of blanket criminal laws (*Blankettstrafgesetze*, *leyes penales en blanco*, *leggi penali in bianco*) basically consists of a special case of legislative drafting techniques that entail the incorporation by reference of a norm existing elsewhere in the legal system to complete a criminal provision.¹⁴⁰ Karl Binding coined the word *Blankettstrafgesetze* (Blanket criminal laws) in his trailblazing work, *Die Normen und ihre Übertretung* (*Norms and their Transgression*). In the first volume of his 1922 five-volume edition, he defined blanket criminal laws as those that contained only the sanction and referenced a number of statutes and administrative or police regulations to complete the precept.¹⁴¹ Until such

¹³⁸ 15 U.S.C. §§ 78l, 78ff (2012).

¹³⁹ The expression "civil law" is used to demarcate those systems of law derived from Roman law, including private and public law, and that are mainly located in Western Europe and Latin America, but can be also found in numerous other parts of the world. Among other sources, see HAROLD J. BERMAN & WILLIAM R. GREINER, *THE NATURE AND FUNCTIONS OF LAW* 571–72 (Foundation Press 1980).

¹⁴⁰ Among many examples, see Article 310 of the Peruvian Criminal Code, "Whoever extracts aquatic flora and fauna species in prohibited times, quantities, and areas or uses prohibited fishing or hunting procedures will be punished with imprisonment no less than one year and no more than three years." See also Article 334 of the Colombian Penal Code: "Whoever, without the permission of a competent authority or infringing existing norms, performs, experiments, introduces or propagates animals, vegetables, or hydro-biological species, or biochemical or biological agents that endanger the health or existence of those species or alter the animal or vegetable population will be punished with imprisonment of two to six years and a fine of 50 to 200 minimum monthly salaries."

¹⁴¹ 1 KARL BINDING, *DIE NORMEN UND IHRE ÜBERTRETUNG: EINE UNTERSUCHUNG ÜBER DIE RECHTMÄSSIGE HANDLUNG UND DIE ARTEN DES DELIKTS*, 161–62 (Scientia Verlag Aalen ed., 4th ed. reprint 1965) (1922).

secondary rules are enacted, the blanket law is “like a wandering body searching for its soul.”¹⁴² Further development of this doctrine included in the category of blanket criminal laws the incorporation by reference of provisions existing within the same statute. In 1931, Edmund Mezger expanded the concept of blanket criminal law to include situations where the same body of law contains the precept in another section.¹⁴³ These cases are called improper blanket criminal laws and cover precisely the situation of the Securities Exchange Act.¹⁴⁴ This category plays a central role in business-related criminal law,¹⁴⁵ where the application of blanket statutes is not only frequent, but is also typical.¹⁴⁶ An example of the completion of a blanket provision is § 3 of the German Law about business crimes (WiStG) dealing with the regulation of prices,¹⁴⁷ as well as with laws regulating wine (WeinG).¹⁴⁸ This theory perfectly applies to the Securities Exchange Act, where section 32(a) is the blanket criminal law norm that incorporates by reference section 10(b).

As a subsidiary argument, I underscore the relativity of the unitary principle invoked by the *Vilar* court; that is, both civil and criminal liabilities should be dealt with in the same way when they arise from the same statute.¹⁴⁹ In addition, as Jonathan Siegel recognizes, it is impossible to anticipate every possible circumstance in which a canon of construction might someday apply.¹⁵⁰ “It is an error to believe that the process of statutory interpretation can ever be mechanized or reduced to a set of determinate, nondiscretionary rules.”¹⁵¹ Furthermore, in *United States v. Nippon Paper Industries*, Circuit Judge Lynch expressed in his concurring opinion that sometimes the

¹⁴² *Id.* at 162.

¹⁴³ EDMUND MEZGER, STRAFRECHT: EIN LEHRBUCH 196 (Verlag von Duncker & Humblot, 3d ed. 1949).

¹⁴⁴ *See id.*

¹⁴⁵ KLAUS TIEDEMANN, WIRTSCHAFTS-STRAFRECHT: EINFÜHRUNG UND ALLGEMEINER TEIL MIT WICHTIGEN RECHTSTEXTEN 87 (Verlag Franz Vahlen ed., 4th ed. 2014).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 54.

¹⁴⁸ *Id.* at 56.

¹⁴⁹ *See generally* *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013).

¹⁵⁰ Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 394 (2005).

¹⁵¹ *Id.*

same language in a statute should not necessarily be read the same way in all contexts to which the language applies: “New content is sometimes ascribed to statutory terms depending upon context.”¹⁵² In *Robinson v. Shell Oil Co.*, the Supreme Court explained that, depending on context, a statutory term might have different meanings in different sections of a single statute.¹⁵³ Furthermore, Justice Stevens has repeatedly recognized that the same word can have different meanings in the same statute.¹⁵⁴

3. THIRD CRITIQUE OF *VILAR*

I will next address the third ground of the *Vilar* decision. The government contended that section 10(b) had different requirements in private law and criminal law; therefore, they should be interpreted in a different way.¹⁵⁵ The “government observe[d] that only private plaintiffs must prove reliance, economic loss, and loss causation, whereas only the government (in criminal cases) must prove that the fraud was committed willfully.”¹⁵⁶ Here is the *Vilar* response followed by my critique:

Critically, however, none of these differences relate to the *conduct* proscribed by Section 10(b) As for the element of willfulness in criminal cases, it comes directly from Section 32 of the Securities Exchange Act of 1934, which permits criminal liability to attach to a violation of Section 10(b), only when the violation is willful. But like the elements relevant only to private plaintiffs, the requirement of proving willfulness has nothing to do with the text or interpretation of Section 10(b). In other words, Section 32 provides no basis for *expanding* the conduct for

¹⁵² *United States v. Nippon Paper Indus.*, 109 F.3d 1, 10 (1st Cir. 1997).

¹⁵³ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343–44 (1997).

¹⁵⁴ *See Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 595 (2004); *see also United States v. Santos*, 553 U.S. 507, 525 (2008) (Stevens, J., concurring).

¹⁵⁵ *United States v. Vilar*, 729 F.3d 62, 75 (2nd Cir. 2013).

¹⁵⁶ *Id.*

**which a defendant may be held criminally liable
under Section 10(b).¹⁵⁷**

This is another instance in which the contribution of the German criminal law model is fundamental. We concede that the conduct described in section 10(b) of the Securities Exchange Act,¹⁵⁸ when read in isolated from Section 32(a),¹⁵⁹ as a description of the external phase of a behavior, is the same for criminal and private law. This external conduct corresponds in German law only to the objective phase of the definition.¹⁶⁰ The same external conduct, however, gains full significance when it is incorporated into a criminal law norm.¹⁶¹ Criminalization operates as King Midas. In the same way that everything King Midas touched became gold, criminalization changes the nature of the behavior it addresses. While the traditional understanding of United States common law is that conduct relevant to criminal law is basically “a willed muscular contraction,”¹⁶² this naturalistic notion of human action has long been abandoned in the majority of civil law countries.¹⁶³ Following the German criminal

¹⁵⁷ *Id.*

¹⁵⁸ 15 U.S.C. § 781 (2012).

¹⁵⁹ 15 U.S.C § 78ff (2012).

¹⁶⁰ Modern developments in criminal law theory following the German model structure the definition of the criminal offense in two phases: an objective and a subjective. *See, e.g.* 1 ENRIQUE CURY URZÚA, DERECHO PENAL, PARTE GENERAL 278–79, 294 (Editorial Jurídica De Chile, 2d ed. 1992).

¹⁶¹ When a certain behavior is criminalized, its statutory definition entails a negative judgment value, technically called the “disvalue of the action.” *See* HANS-HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS ALLGEMEINER TEIL 238–46 (Dunker & Humblot Berlin 1996).

¹⁶² GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL, VOLUME 1: FOUNDATIONS 269 (Oxford U. Press 2007) [hereinafter GRAMMAR OF CRIMINAL LAW]; *see also* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 44–46, 50–53 (Oxford U. Press 1998) [hereinafter BASIC CONCEPTS OF CRIMINAL LAW].

¹⁶³ *See* definition of “civil law system” in footnote 139. Some examples of scholarship from the numerous civil law countries where a naturalist notion of conduct was overcome are from Peru, *see* JOSE HURTADO POZO, MANUAL DE DERECHO PENAL, PARTE GENERAL 381–394 (3d. ed. 2005); from Colombia, *see* FERNANDO VELAZQUEZ V., DERECHO PENAL, PARTE GENERAL 508–22 (4th ed. 2009); from Costa Rica, *see* GUSTAVO CHAN MORA & JAVIER LLOBET RODRIGUEZ, FRANCISCO CASTILLO GONZALEZ Y EL DERECHO PENAL COSTARRICENSE, *cited in* HOMENAJE AL PROF. FRANCISCO CASTILLO GONZALEZ EN SUS 70 ANOS 38–39 (2014); from Argentina, *see* EUGENIO RAUL ZAFFARONI,

law model, most of these countries have developed a more comprehensive and deeper concept of the nature of conduct in criminal law, which is still evolving and undergoing scholarly inquiry.¹⁶⁴

Since the first half of the twentieth century, human conduct is no longer regarded by most civil law system specialists as a simple muscular contraction, but rather as an indivisible blend of objectivity and subjectivity.¹⁶⁵ After a long process of theoretical transformation, especially since the normative theory of culpability,¹⁶⁶ and even more so since the goal-oriented theory of conduct¹⁶⁷ was formulated, intent and negligence are no longer considered forms of

TRATADO DE DERECHO PENAL, PARTE GENERAL, VOLUME 3 97–134 (Ediar 1981); from Chile, *see* CURY URZÚA, *supra* note 160, at 249, 294; and from Spain, *see* SANTIAGO MIR PUIG, INTRODUCCION A LAS BASES DEL DERECHO PENAL 221 (2d edition 2003).

¹⁶⁴ CLAUSE ROXIN, STRAFRECHT, ALLGEMEINER TEIL, VOLUME 1 236–70 (Verlag C.H. Beck München 2006).

¹⁶⁵ *See* BASIC CONCEPTS OF CRIMINAL LAW, *supra* note 162, at 50–53; *see also* HANS WELZEL, EL NUEVO SISTEMA DEL DERECHO PENAL 62 (1964). In Argentina, Professor Frías Caballero taught that the criminal offense is a set of interdependent elements “and that each element is a function of the other” and that “each element has both an objective and a subjective aspect.” MARIANO CUNEO LIBARONA, FRIAS CABALLERO: SU CATEDRA SOBRE LA TEORIA DEL DELITO, *in* HOMENAJE AL PROFESOR DR. JORGE FRÍAS CABALLERO 139,141 (Colegio De Abogados Del Departamento Judicial La Plata 1998).

¹⁶⁶ The normative theory of culpability started with Reinhard Frank in 1907 (ÜBER DEN AUFBAU DES SCHULDBEGRIFFS (1907)) and was later developed by a string of scholars. For this theory, culpability is basically blameworthiness. The structure of culpability according to this theory is constituted by the following three elements: capacity of being culpable (not being insane or an infant); intent or negligence, which are the psychological links between actors and their conduct; and the normality of the attendant circumstances. This means that in a concrete situation, actors should have the power to act lawfully so that one can blame them if they act wrongfully. In other words, the attendant circumstances must warrant a fair expectation that actors behave in accordance with the law.

¹⁶⁷ The theory of purposive action (teleological or goal-oriented action) was conceived by Hans Welzel, who defined it as an activity consciously oriented towards a goal. This theory became the basis of the modern characterization of criminal offenses. The advocates of the teleological or goal-oriented theory of action criticize the formulation of the normative theory of culpability mentioned in the previous footnote. They claim that since the normative theory includes intent and negligence as one of the elements composing the structure of culpability, it confuses the value judgment of culpability with the valued object (negligent or intentional action). Culpability therefore consists of a pure value judgment of blameworthiness, and intent and negligence are part of the conduct, which is the object

culpability, but part of the subjective phase of the definition of the criminal offense.

In addition to the correspondence of a particular conduct with the definition of the criminal offense, both in its objective and subjective phases, such conduct must also be wrongful and culpable in order to constitute a criminal offense.¹⁶⁸ A particular conduct is *wrongful* when it contradicts legal norms protecting vital legal interests and values¹⁶⁹ that are significant enough to justify retributive consequences instead of mere compensatory ones.¹⁷⁰ This is clear in the *Vilar* case, where the possible punishment may reach a twenty-year sentence of imprisonment and criminal fines far exceeding the extent of the damages.¹⁷¹ Moreover, such wrongful conduct must also be *culpable* in the sense that the perpetrator must be personally blameworthy for the wrongful conduct.¹⁷²

of the value judgment. Therefore, intent and negligence are no longer elements in the structure of culpability, but elements belonging to the definition of the criminal offense to which the conduct should adjust. The teleological or goal-oriented theory of culpability revamps the structure of culpability, which is now composed of three elements. The first element is the capacity of culpability; that is, the general capacity to understand the significance of one's wrongdoing and to determine oneself according to such understanding (e.g., infants and the insane are not capable of culpability). The second element is the possibility to understand the significance of one's wrongdoing in a concrete situation. When actors not only lack the actual consciousness of their wrongdoing, but also lack the possibility of attaining it, they cannot be blamed (cases of mistake about the legal prohibition). The third element is the possibility to determine oneself in conformity with the requirements of the legal order. In other words, it is necessary that attendant circumstances warrant a fair expectation that actors act in harmony with the legal order to consider them blameworthy. In this respect, it is not fair to expect law-abiding behavior in situations of duress, concealment of close relatives from criminal persecution, and illegal superior orders. *See generally* H. WELZEL, *DERECHO PENAL ALEMAN, PARTE GENERAL* (11th ed. 1970).

¹⁶⁸ *See* JESCHECK & WEIGEND, *supra* note 161, at 218.

¹⁶⁹ German criminal law considers the theory of *Rechtsgut* as the basic tenet of criminal law. "*Rechtsgut*" can be translated as the vital interests and values of the individual and society that are protected by criminal law.

¹⁷⁰ *See* JESCHECK & WEIGEND, *supra* note 161, at 256–60.

¹⁷¹ *United States v. Vilar*, 729 F.3d 62, 95–97 (2nd Cir. 2013).

¹⁷² *See* WELZEL, *supra* note 167, at 197.

Within the context of securities fraud, the specific word “willfully” contained in § 32(a)¹⁷³ means that the action externally described in §10(b)¹⁷⁴ must be committed with the consciousness of its wrongfulness.¹⁷⁵ The *Vilar* court erroneously stated that “willfulness” has nothing to do with the text or the interpretation of §10(b).¹⁷⁶ Quite the contrary, “willfully” indicates the specific subjective requirement needed for the structural transformation of the conduct externally described in section 10(b) into the complex combination of external and internal elements that actually constitute a particular criminal conduct.¹⁷⁷ To understand this transformative role of the expression “willfulness,” one should of course connect it with the high degree of wrongfulness of which the perpetrator should be aware.¹⁷⁸ In this context, the subjective requirement of

¹⁷³ 15 U.S.C. § 78ff (2012).

¹⁷⁴ 15 U.S.C. § 78l (2012).

¹⁷⁵ In the United States, the term “willfully” is surrounded with interpretive confusion. The Supreme Court has pointed out that the word “willful” is a “word of many meanings.” *Spies v. United States*, 317 U.S. 492, 497 (1943). In the context of securities fraud, however, the Ninth Circuit has interpreted this term correctly. The Ninth Circuit interpreted “willful” as “intentionally undertaking an act that one knows to be wrongful.” *United States v. Tarallo*, 380 F.3d 1174, 1188 (9th Cir. 2004). This decision is case-specific and in the United States, neither courts nor scholars have categorized this concept within a comprehensive theory of the criminal offense. “Willfulness” has neither been related to the conduct nor to the values and interests protected by the criminalization of such conduct, as it is the case in the German model.

¹⁷⁶ *See Vilar*, 729 F.3d at 75–76.

¹⁷⁷ *See supra* note 165.

¹⁷⁸ *See supra* note 161. The term “willfulness” (*see supra* note 175) as defined by the Ninth Circuit in *United States v. Tarallo*, 380 F. 3d 1174, 1183 (2004), links the intentionality with the high degree of wrongfulness needed to transform the securities fraud into a criminal offense. The decision of Congress to make a behavior criminal implies the requirement of a serious culpable wrongdoing; that is, the willful conduct should contradict basic vital social values consisting in this case in the integrity of the financial market as a crucial part of the economy. While civil and administrative actions are available for the infringement of any rule under the Securities Exchange Act, only a limited number are subject to criminal enforcement. For example, filing violations would be excluded from the latter. It is necessary that the culpability of the perpetrator should be based on a degree of wrongfulness enough to compromise the integrity of the financial market and to thus arouse the moral condemnation of society.

“willfulness” indicates a high degree of antisociality enough to justify the application of the criminal justice system.¹⁷⁹ To criminally enforce a statute means that its infringement has attained such gravity that it deserves the moral condemnation of all society.¹⁸⁰

We have already used theoretical German legal approaches to reformulate the notion of human conduct to challenge the Second Circuit’s assumption that the notion of conduct is the same in both civil and criminal contexts¹⁸¹ and to interpret the nature and scope of the word “willfully.”

The adverb “willfully” is given a pivotal role in section 32(a)’s definition of the crime.¹⁸² It corresponds in American terminology to the *mens rea* of securities fraud.¹⁸³ As mentioned earlier, some American scholars have noted insufficiencies in American law regarding this concept. These well-founded scholarly complaints justify the present article’s reliance on foreign legal systems in search for conceptual clarification. Consider, for instance, Michael L. Seigel’s complaints.¹⁸⁴ Seigel denounces the massive confusion related to the interpretation of the phrase *mens rea*¹⁸⁵ and undertakes a review of the multiple and conflicting interpretations of this key phrase, which determines whether the actor has committed a crime or not.¹⁸⁶

Seigel praises the Model Penal Code (“MPC”), published by the American Law Institute in 1962, for unifying and simplifying the common law’s *mens rea* terminology, and he recommends emphatically its adoption in the field of securities-related criminal offenses.¹⁸⁷ It is true that the MPC has improved and unified *mens rea*

¹⁷⁹ See *supra* note 178.

¹⁸⁰ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 2 (5th ed. 2009).

¹⁸¹ *United States v. Vilar*, 729 F.3d 62, 74 (2d Cir. 2013).

¹⁸² 15 U.S.C. § 78ff (2012).

¹⁸³ See Leng-Chia Hung, *Securities Markets—A Place to Get Rich Quick or a Quicksand Going Straight to Jail? The “Mens Rea” Required for Insider Trading Criminal Liability*, 5 NAT’L TAIWAN U. L. REV. 2 (2010).

¹⁸⁴ Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offences*, 2006 WIS. L. REV. 1563, 1569 (2006).

¹⁸⁵ *Id.* at 1565.

¹⁸⁶ See generally *id.*; see also Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21 (2001).

¹⁸⁷ Model Penal Code § 2.02 (AM. LAW INST., Proposed Official Draft 1962).

terminology; however, it has not reached the conceptual depth achieved by other legal systems since 1962.¹⁸⁸ A comparative perspective might provide American scholarship with the intellectual instrument to better understand the role and significance of a particle such as “willfully” within the context of a statute that criminalizes behavior otherwise considered to be a mere civil or administrative wrong. The need for such a contribution can be inferred from Joshua Dressler’s insights into the ambiguity of the term *mens rea*.¹⁸⁹ Although apparently Professor Dressler is not aware of theoretical criminal law developments in the civil law world, or at least he does not refer to them, he intuitively understands some of the categories elaborated in these countries.¹⁹⁰

Dressler has clearly perceived that the words “*mens rea*” hide two different meanings: the “culpability” meaning and the “elemental” one.¹⁹¹ According to the former, *mens rea* denotes a morally blameworthy state of mind, while the latter indicates “the particular mental state” elements included in the definition of certain criminal offenses.¹⁹² Such a perception has led to the reformulation of the concept of criminal offense in countries that follow the German model.¹⁹³

In German legal literature, which has influenced most civil law countries in the last half of the twentieth century, the notions of “action,” “behavior,” and “conduct” are dealt with as inextricably linked with intent, as opposed to older approaches in which human beings were viewed as responsive machines.¹⁹⁴ The expression

¹⁸⁸ Originally, culpability was conceived as a nexus or psychological link between the actor and the act. This link manifested itself in two forms: intent and negligence. In the latest developments of criminal law theory, culpability became a pure judgment of blameworthiness composed of three elements: capacity of culpability (i.e. sanity or age), the actual possibility of knowing the wrongfulness of the action, and the ability to conform the action to the requirements of the law. See WELZEL, *supra* note 167, at 214.

¹⁸⁹ See DRESSLER, *supra* note 180, at 118–19.

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ Wolfgang Naucke, *An Insider’s Perspective on the Significance of the German Criminal Theory’s General System for Analyzing Criminal Acts*, *BYU L. REV.* 305 (1984); see also Dubber, *supra* note 90.

¹⁹⁴ See GRAMMAR OF CRIMINAL LAW, *supra* note 162, at 289.

“willfulness” cannot be seen, as in the *Vilar* decision, as a mere appendage that triggers the intervention of the criminal justice system; rather, it must be viewed as a crucial element in the definition of a crime, transforming the nature and substance of the defined conduct. In these new developments of criminal-law thought, human conduct is no longer conceived as “a willed muscular contraction” but as goal-oriented.¹⁹⁵ Intent, therefore, traditionally defined as a form of culpability, becomes an essential component of the notion of conduct.¹⁹⁶ Culpability, on the contrary, is a judgment about such conduct that takes place at a later stage of analysis.¹⁹⁷ It consists of determining the personal blameworthiness of the perpetrator, taking into account circumstances such as mental health, maturity, possibility of knowing the transgressed legal precept, and absence of duress.¹⁹⁸ Dressler, as explained above, has picked up on the ambiguity of the word *mens rea*, used indifferently as a descriptive element of a particular state of mind or as culpability in the general sense of blameworthiness.¹⁹⁹ This is to a certain extent an approximation to similar modern doctrinal developments in the civil law system.²⁰⁰

The crime of securities fraud is actually defined in section 32(a), in which “willfulness” is an essential element of this definition. For the rest, it incorporates 10(b) by reference.²⁰¹ Accordingly, it is misleading to affirm, as Judge Cabranes does in *Vilar*, that the willful commission of the fraud does not relate to the conduct prescribed by

¹⁹⁵ *Id.* at 269; see BASIC CONCEPTS OF CRIMINAL LAW, *supra* note 162, at 51–53.

¹⁹⁶ See CURY URZÚA, *supra* note 160, at 249, 294.

¹⁹⁷ See WELZEL, *supra* note 167, at 214.

¹⁹⁸ See *id.*

¹⁹⁹ See DRESSLER, *supra* note 180.

²⁰⁰ In the modern civil law system developments, intent has been removed from the notion of culpability and has become part of the notion of conduct and therefore of the definition of the offense. Culpability, on the other hand, is a separate element of the criminal offense considered in the last stage of the crime’s analysis consisting of a pure judgment of blameworthiness, as specified in note 188. Dressler understands that, on the one hand, the word *mens rea* means intent as part of the definition of the offense, while, on the other hand, it refers to a general judgment of blameworthiness.

²⁰¹ 15 U.S.C. § 78ff (2012).

section 10(b).²⁰² Quite to the contrary, “willfully” is an essential element of the conduct, transmuting section 10(b) after its incorporation by reference to section 32(a).²⁰³

The confusion of the court can be traced to the ambiguous nature of *mens rea* in the Anglo-American tradition and how this ambiguity “loops back and undermines our understanding of human action.”²⁰⁴

Judge Cabranes erroneously concludes that proving willfulness has nothing to do with the text or interpretation of section 10(b).²⁰⁵ He ignores that willfulness transforms the nature of the conduct. By using such an expression, the Exchange Act refers to a particular conduct that poses a social threat to the vital values and interests of the community and becomes the object of moral condemnation of a whole society.²⁰⁶ This is, however, just the beginning of our argument. Any homicide, rape, or larceny is criminal conduct subject to social condemnation and moral opprobrium, but the circumstances in themselves do not justify their extraterritorial application.²⁰⁷ *Bowman* expressly underscores that many intrinsically local crimes fall within the territorial jurisdiction of the state and cannot be applied extraterritorially without an express mandate from Congress.²⁰⁸

Further inquiry into the governmental and social value protected by 32(a) combined with 10(b), that is, the integrity of the securities market, leads us to conclude that such value is similar to those values protected by the Supreme Court in *Bowman* and used to affirm

²⁰² United States v. Vilar, 729 F.3d 62, 75–76 (2d Cir. 2013).

²⁰³ 15 U.S.C. §§ 78l, 78ff (2012).

²⁰⁴ GRAMMAR OF CRIMINAL LAW, *supra* note 162, at 288.

²⁰⁵ Vilar, 729 F.3d at 75–76.

²⁰⁶ See DRESSLER, *supra* note 180, at 118–19.

²⁰⁷ To justify their extraterritorial application without an express congressional mandate, it is necessary, using Chief Justice Taft’s words, that these “offen[s]es ‘are such that to limit their [prosecution] to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute.’” ALEJANDRO CHEHTMAN, THE PHILOSOPHICAL FOUNDATIONS OF EXTRATERRITORIAL PUNISHMENT 76 (Oxford U. Press 2010) (internal citation omitted).

²⁰⁸ See United States v. Bowman, 260 U.S. 94, 98 (1922).

the will of Congress to apply the criminal provision extraterritorially.²⁰⁹ The globalization of securities markets has brought about its delocalization and, therefore, places it under the *Bowman* exception to the presumption against extraterritoriality.²¹⁰

After having determined that “willfulness” transforms the nature of the definition of fraud provided by section 10(b) into a criminal offense, the next step is to determine that the social value protected by such criminal provision rises to the nature of governmental interest that, according to *Bowman*, justifies its extraterritorial application. The Securities Exchange Act was basically enacted to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation necessary to sustain economic growth.²¹¹ The delocalization of securities markets requires the extraterritorial application of the Act to attain these goals.

4. FOURTH CRITIQUE OF *VILAR*

Here is *Vilar*’s last relevant proposition, followed by my critique:

The government argues that criminal statutes ‘are concerned with prohibiting individuals . . . from defrauding American investors and from using the infrastructure of American commerce to defraud investors’ and that applying the presumption against extraterritoriality to criminal statutes ‘would create a broad immunity for criminal conduct simply because the fraudulent

²⁰⁹ As for example, the environment in *Skiriotes v. Florida*, 313 U.S. 69 (1941), and the integrity of the bankruptcy proceeding in *Stegeman v. United States*, 400 U.S. 837 (1970).

²¹⁰ See note 132; see also RYNGAERT, *supra* note 2, at 187.

²¹¹ “The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.” U.S. Securities and Exchange Commission, *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, <http://www.sec.gov/about/whatwedo.shtml> (last visited Oct. 22, 2015). The Securities and Exchange Act of 1934 mentions in Section 12 that the purposes of the Act are the maintenance of fair and orderly markets and the protection of investors and the public interest. See Securities Exchange Act of 1934, Pub. L. No. 112–158, § 12 (2012).

**scheme culminates in a purchase or sale abroad.’
But much the same could be said of civil fraud
statutes: Applying the presumption against extra-
territoriality immunizes thieves and swindlers
from civil liability for defrauding Americans
abroad.²¹²**

To justify the application of *Morrison* to criminal cases, the *Vilar* court considers that the strict application of the presumption against extraterritoriality has the same consequences in civil and criminal realms.²¹³ If it were the same to dispense civil wrongdoers from liability as to immunize perpetrators from criminal responsibility for a certain behavior, there would be no reason to criminalize such behavior in the first place. There is a fundamental difference between reduced protection of individuals against personal damages and reduced protection of society against attacks to its vital social interests and values, such as the integrity of financial markets. This qualitative difference is reflected in the difference between civil and criminal law procedures. Securities fraud can reach such gravity as to concern not only the direct victim, but also the entire society.²¹⁴ The award of compensatory damages results in a money transfer from one person to another, while a criminal law conviction implies the moral condemnation made by an entire society.

Business-related criminal law typically protects supra-individual vital interests and values, such as the integrity of securities markets.²¹⁵ In a globalized economy, these legally protected collective interests have experienced such a delocalization that, to be meaningfully protected, they can hardly be constrained by strict territorial limitations.

Another aspect of the distinction between civil and criminal law that justifies its separate treatment regarding extraterritoriality is the motivation and purposes of private litigants as opposed to those of

²¹² United States v. Vilar, 729 F.3d 62, 74 (2d Cir. 2013) (internal citations omitted).

²¹³ See *id.*

²¹⁴ See Edgardo Rotman, *La Criminalidad Financiera en el Siglo XIX*, 2 REVISTA DE DERECHO PENAL Y CRIMINOLOGIA 234 (1969).

²¹⁵ TIEDEMANN, *supra* note 145, at 67.

public prosecutors.²¹⁶ *Morrison*'s merit was to curtail the abusive use of the American judicial system by Australian plaintiffs in an intrinsically Australian case.²¹⁷ This case was an illustration of Lord Denning's remark: "[a]s a moth is attracted to the light, so is a litigant drawn to the United States."²¹⁸ Foreign litigants often elect the United States forum, searching for handsome jury awards, punitive damages, contingency fees, ample discovery, and other attractions offered by American courts.²¹⁹ In private actions, profit considerations command the forum selection and eclipse any public policy considerations.²²⁰

A criminal action initiated by a public plaintiff, such as the Department of Justice, is unlikely to ignore potential international conflicts and will try to avoid them. The main reason supporting the presumption against extraterritoriality is dispelled when a branch of the United States government seriously concerned with avoiding international friction prosecutes the securities fraudsters.²²¹ This is the

²¹⁶ "The enforcement for violation of federal securities law is carried out at the administrative, civil and criminal levels. The SEC has the authority to initiate investigations of potential violations and to prevent them through civil and administrative enforcement. The Department of Justice has sole jurisdiction over criminal proceedings." Christopher A. Yeager, *Securities Fraud*, 51 AMER. CRIM. L. REV. 1720 (2014). In addition, a federal district court in Pennsylvania recognized a private right of action for violation of Rule 10b-5 in *Kardon v. Nat'l Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa. 1947). The federal case law developed on this subject was officially recognized by the Supreme Court in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). See Daniel E. Herz-Roiphe, *Innocent Abroad?: Morrison, Vilar, and the Extraterritorial Application of the Exchange Act*, 123 YALE L.J. 1875 (2014) (provides important insights on the difference of securities fraud private and public actions).

²¹⁷ See generally *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 248 (2010).

²¹⁸ *Smith Kline & French Lab. Ltd. v. Bloch*, [1983] 1 W.L.R. 730 (C.A.) at 733 (Lord Denning, M.R.) (Eng.).

²¹⁹ ANDREW BELL, *FORUM SHOPPING AND VENUE IN INTERNATIONAL LITIGATION* 20, 29, 31 (Oxford U. Press 2007); GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES* 3–5 (Wolters Kluwer 1996).

²²⁰ On the strong monetary incentives for aggrieved investors in private enforcement, see generally Nishal Ray Ramphal, *The Role of Public and Private Litigation in the Enforcement of Securities Laws in the United States*, RAND DISSERTATION SERIES 2007.

²²¹ For a similar argument, see Daniel E. Herz-Roiphe, *supra* note 216.

reason why the Dodd-Frank Act attempted to reintroduce the “conduct” and “effects” tests for public enforcement of the United States law, whether by the SEC or the DOJ.²²²

CONCLUSIONS

The *Vilar* decision incorrectly applies the *Morrison* holding to a very different factual and legal setting. *Morrison* is about a private law class action involving an evident abuse of the United States judicial system by Australian litigants.²²³ This abuse led to a unanimous rejection by the district and circuit federal courts as well as by the totality of the Supreme Court justices.²²⁴ In contrast, *Vilar* is about an action brought by the Department of Justice against transnational criminals to preserve social values of the highest rank, such as financial market integrity and investors’ trust.²²⁵ The severity of the punishment, imprisonment of up to twenty years and significant fines, demonstrates the gravity of the crime for which Vilar and his accomplice were accused.²²⁶ Unlike the National Australia Bank agents in *Morrison*, Vilar and his accomplice were not trying to gain U.S. jurisdiction, but rather were attempting to avoid it.²²⁷

The Supreme Court’s *Morrison* decision is silent on whether its interpretation of the Securities Exchange Act covers criminal prosecutions.²²⁸ What’s more, Justice Stevens’s concurrence was in the understanding that public enforcement of the Exchange Act’s anti-fraud provisions was not included in the holding.²²⁹

The *Vilar* court extended *Morrison*’s restrictive holding to the criminal antifraud provisions of the Exchange Act, disregarding essential substantive and procedural differences between the civil and

²²² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010).

²²³ See generally *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 247 (2d Cir. 2008).

²²⁴ See generally *id.*; see also *Morrison*, 547 F.3d at 172 (2d Cir. 2008).

²²⁵ See generally *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013).

²²⁶ See generally *id.*

²²⁷ See generally *Morrison*, 561 U.S. at 247; *Vilar*, 729 at 62.

²²⁸ See generally *Morrison*, 561 U.S. at 247.

²²⁹ See *id.* at 274 (Stevens, J., concurring).

criminal law ambits.²³⁰ The Court further ignored the dynamic character and the purposes of the Securities Exchange Act in a world of internationalized financial markets.²³¹

Despite its wholehearted adherence to *Morrison*'s interpretation of the Act, *Vilar* recognized that *United States v. Bowman* had survived *Morrison*.²³² Such recognition opens a significant crack in the presumption against extraterritoriality, a seemingly iron wall in Justice Scalia's own statutory interpretative methodology.

After undermining the presumption against extraterritoriality by recognizing the validity of the *Bowman* exception, *Vilar* tried to backtrack by giving the narrowest possible interpretation of *Bowman*.²³³ This artificial conclusion betrays not only *Bowman*'s words, but also its spirit.

It is important to bear in mind that the presumption against extraterritoriality is not a constitutional principle; it is a canon of interpretation with dubious precedential value.²³⁴ This is a case in which *Morrison*'s supportive rationale should not be binding, and its interpretative methodology should not be adopted—all the more so, as in this case, when they are applied to new and different factual contexts.

Statutory interpretative methodology is not part of the holding. “[U]nder the doctrine of *stare decisis* a case is important only for what it decides—for the ‘what,’ not for the ‘why,’ and not for the ‘how.’”²³⁵ In this respect, Randy J. Kozel warns against precedents defined “capaciously and inclusively in constraining future courts,” as is often the case in contemporary federal practice.²³⁶ *Morrison* is an example of this unwarranted broadening of the holding's scope.

²³⁰ See generally *Vilar*, 729 at 62.

²³¹ See *id.*

²³² See *id.*

²³³ See *id.*

²³⁴ See Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 760–65 (2013); see also Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008) (while actually advocating for giving *stare decisis* effect to statutory interpretation methodology, implicitly recognizing that as of now the state of the law does not accept it).

²³⁵ *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996).

²³⁶ Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 230 (2014).

Scalia himself believes that dicta are “binding upon neither” the Supreme Court nor the inferior courts, and that they do not deserve *stare decisis* weight.²³⁷ Moreover, as Judge Leval pointed out, “[t]he Supreme Court’s dicta are not law,” and judges “may not treat Supreme Court’s dictum as dispositive.”²³⁸ Although Scalia emphasizes that the presumption against extraterritoriality has historical lineage,²³⁹ such circumstance does not prove binding force.²⁴⁰

Furthermore, sections 10(b) and 32(a) of the Securities and Exchange Act should be interpreted systematically and in accordance with the purposes of the Securities Exchange Act.²⁴¹ The definition of the crime prosecuted in *United States v. Vilar* is contained in section 32(a).²⁴² As a blanket provision, this section incorporates by reference section 10(b), which provides the external description of the criminalized behavior.²⁴³ Moreover, section 32(a) criminalizes securities fraud by punishing it with a severity commensurate to the values protected by such criminal provision.²⁴⁴

The term “willfully” in section 32(a) is inextricably related to the conduct externally described in section 10(b) and incorporated by reference into the criminal provision of section 32(a).²⁴⁵ The law requires a specific state of mind when securities frauds have reached the magnitude that justifies their criminalization (that is, threatening both market integrity and public wealth).²⁴⁶ The protection of these vital social values that are instrumental to the workings of the economy led the legislator to create a new criminal provision. This provision includes the more stringent requirement of consciousness of a type of wrongfulness, the magnitude of which explains such criminalization. Perpetrators must be aware of the contradiction of their

²³⁷ *Id.* at 187 (citations omitted) (internal quotation marks omitted).

²³⁸ Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1274 (2005).

²³⁹ Parrish, *supra* note 28, at 98.

²⁴⁰ Kozel, *supra* note 236, at 191.

²⁴¹ *See supra* note 211.

²⁴² 15 U.S.C. § 78ff (2012).

²⁴³ 15 U.S.C. §§ 78l, 78ff (2012).

²⁴⁴ 15 U.S.C. § 78ff.

²⁴⁵ 15 U.S.C. §§ 78l, 78ff (2012).

²⁴⁶ *See supra* notes 161, 178.

behavior with vital social values to an extent that justifies their criminal law protection under section 32(a) of the Securities Exchange Act.²⁴⁷

Therefore, in the context of securities frauds, the adverb “willfully” stands for a manipulative or deceptive device or contrivance made unlawful by section 10b of the Exchange Act, carried out with the awareness of its inherent highly detrimental nature. The magnitude of the action’s harmfulness should be measured against its aptitude to compromise the integrity of the financial market, thus reaching the point that had led Congress to criminalize it in the first place.²⁴⁸ “Willfully,” therefore, is not a mere appendage disconnected from the conduct externally described by section 10(b), as *Vilar* shortsightedly believes.

Moreover, it is precisely the transnational nature of the values of market integrity and public wealth protected by section 32(a) that justifies the extraterritorial application of the Securities Exchange Act antifraud provisions. The globalization of financial markets regulated by the Securities Exchange Act demands a dynamic interpretation of the Act, in light of its “present societal, political, and legal context.”²⁴⁹

²⁴⁷ *See id.*

²⁴⁸ *See id.*

²⁴⁹ William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987).